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Supreme Court of the United States

OCTOBER TERM 1970

NO. 434

UNITED TRANSPORTATION UNION, as successor to the BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

THE STATE BAR OF MICHIGAN

On Writ Of Certiorari To The Supreme Court Of The State Of Michigan.

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus,* in support of the Petitioner's position, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), with the consent of the parties as provided for by Rule 42 of the Rules of this Court.

The AFL-CIO is a federation of one hundred twenty-one national and international trade unions having a total membership of approximately thirteen million five hundred thousand working men and women. This is the third case, involving a group legal service plan founded and directed by a union, that this Court has heard in the past six years, see also, *Trainmen* v. *Virginia Bar,* 377 U.S. 1 (1964); *Mine Workers* v. *Illinois Bar,* 389 U.S. 217 (1967). This figure demonstrates both the labor movement's deepseated interest in fostering constructive developments in this area, and the organized bar's determined resistance to such advances. And it is because of the Federation's profound belief that group legal services provide the best hope of

meeting the legal needs of the average worker that this brief *amicus* is filed to acquaint the Court with its views as to why the decision of the court below should be reversed.

ARGUMENT

THERE HAS BEEN NO SHOWING OF A COMPELLING SUBORDINATING STATE INTEREST WHICH WOULD JUSTIFY THE INJUNCTION REGULATING FIRST AMENDMENT ACTIVITY WHICH HAS BEEN ENTERED HERE.

The importance of the instant case is patent. This Court so recognized by granting the Petition for a Writ of Certiorari. Yet, it is also manifest that its disposition does not require resolution of any novel issue of substance. For, reversal of the decision below is required by *NAACP* v. *Button*, 371 U.S. 415 (1963), *Trainmen* v. *Virginia Bar*, 377 U.S. 1 (1964), and *Mine Workers* v. *Illinois Bar*, 389 U.S. 217 (1967). The explanation of this seeming paradox lies in the hostility of significant segments of the bar and bench to group legal services' plans such as that in issue here, i.e.:

> "Plans by which legal services are rendered:
>
> (1) To individual members of a group identifiable in terms of some substantial common interest,
>
> (2) By a lawyer provided, secured, recommended or otherwise selected by:
>
> (a) The group, its organization, or its officers; or
>
> (b) Some other agency having an interest in obtaining legal services for members of the group." Report of the ABA's Special Committee on Availability of Legal Services, 8 (Aug. 1969).

The Special Committee, chartered by the American Bar Association to study group legal service plans found that the available evidence:

> "amply show[s] that there has been and continues to be an unmet need for legal services . . . [Moreover] all of the studies which have been conducted identify unfamiliarity with legal rights, lack of personal contact

with a lawyer and the cost (or fear of the cost) of his services as the basic reasons why people fail to seek lawyers' services. To a greater degree than any other device, group arrangements provide a solution to all these problems." Special Committee Report, *supra*, at 19.[1]

Nevertheless, the organized bar has continued on its traditional path of maximum feasible resistance. In August 1969 the House of Delegates, the ruling body of the ABA, adopted Disciplinary Rule 2-103(D) which provides that:

> "A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates."

This sweeping prohibition is subject to the exception relevant here that such assistance may be accorded:

> "Any . . . non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, *but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities.*" (emphasis supplied).

As the Special Committee Report, *supra*, properly stated, (at p. 3), the ABA's rule "places the profession in the deplorable position of conceding with obvious reluctance that we will honor the constitutional rights of our prospective clients—but no more."[2]

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[1] The studies underlying this conclusion are reviewed in the briefs *amicus* filed by the AFL-CIO and by the NAACP Legal Defense Fund in *Mine Workers*, No. 33, October Term, 1966. Since neither the Special Committee, nor our own research, has uncovered significant later source material we respectfully refer the Court to those briefs.

[2] Mr. Justice Harlan, is his dissent in *Mine Workers*, 389 U.S. at 223 n. 17 noted that the question of whether the "prevailing Canons of Ethics and traditional customs in the legal profession will have to be modified to keep pace with the needs of new social developments" was under consideration by the ABA. Disciplinary Rule 2-103(D) is the result of that consideration. It assures that there will be no forward-looking leadership from the organized bar.

The Michigan Supreme Court approached the instant case in the same grudging spirit that has characterized the bar's efforts. This is demonstrated by two facets of its opinion. First, the court below was all but unconcerned with the question of whether this Court's opinions permitted the state bar to secure any relief at all. Instead its concern was to insure that the Union not receive:

> "more First and Fourteenth Amendment protection than the State of Virginia now provides for it. Holding, then, that the Jackson circuit's decretal judgment of 1968 is in accord with the present Virginia decree, we align ourselves with that decree. In short, this Court is not ready—absent a specific order forwarded from Washington—to grant the Brotherhood more relief in Michigan that it has obtained thus far in Virginia." (A. 213).

Second, the court below flatly refused to apply the teachings of this Court in *Mine Workers*, which was decided after the instant case was remanded to the trial court, but prior to the trial court's decision on remand:

> "We decline to extend or apply *Mine Workers* to our question; a question which in 1965 was sent back to the Jackson circuit for consistency with the 1964 Brotherhood Case—that only." (A. 214).

The result was that the Michigan Supreme Court fell into plain error—as we shall now demonstrate.

1. The basic teaching of *Button*, *Trainmen* and *Mine Workers* is that group activity designed to obtain judicial redress is within the scope of the First Amendment. Such activity, if it is to be meaningful, must fulfill two functions. The first is a "public awareness" and "contacting" function, i.e., the plan must apprise members of their legal rights and advise them of a reliable lawyer familiar with the particular legal problem in question. The second is an "economic function", i.e., the plan must provide a system which spreads costs, and/or increases efficiency and volume thereby making it possible to reduce unit expenses. See, M. Schwartz, *Foreword: Group Legal Services in Perspective*,

12 U.C.L.A.L. Rev., 279, 285-286 (1965). For, as the former Solicitor General, Prof. Archibald Cox, has stated:

> ". . . [T]he unfilled need for legal services would seem to center about two difficulties which it may be impossible to overcome without changes in the organization, or structure, of the legal profession and, incidentally, in some of the canons of ethics.
>
> "The first difficulty is the inability of individuals to meet the high cost of the legal services that they occasionally require. It is not that fees are too high. Rendering skilled advice requires time and training that deserve adequate compensation. . . . With the low and middle income groups the financial problem is [that] . . . the need arises suddenly, the cost is disproportionate to income and no savings have been accumulated against the contingency. This economic segment of society taken as a class, however, can afford to, and should therefore, pay for legal services if some way can be found of spreading and sharing the costs.
>
> "Second, and possibly more important, is the problem of ignorance. The ignorance is of two kinds; first, ignorance of the possibility that legal advice might be helpful and legal remedies may be available; second, distrust of strange lawyers and ignorance as to whether and where reliable legal services can be obtained either without cost or with the limited ability to pay . . ." A. Cox, *Poverty and the Legal Profession*, 54 Ill. B.J. 12, 14-15 (1965).

In recognition of the fact that meaningful access to the courts is a fundamental right, this Court has ruled that both basic aspects of group legal service plans are constitutionally protected. *Trainmen* holds (377 U.S. at 5-6):

> "It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be in vain and futile if the workers could not talk together freely as to the best course to follow. The right of members to consult with each other in a fraternal

organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of the workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance—and, most importantly, what lawyer a member could confidently rely on—is an inseparable part of this constitutionally guaranteed right to assist and advise each other."

And *Mine Workers* overturned a decree prohibiting "any financial connection of any kind" between the association and the lawyer it recommended (389 U.S. at 225):

> "The decree at issue here thus substantially impairs the associational rights of the Mine Workers and is not needed to protect the State's interest in high standards of legal ethics. In the many years the program has been in operation, there has come to light, so far as we are aware, not one single instance of abuse, of harm to clients, of any actual disadvantage to the public or to the profession, resulting from the mere fact of the financial connection between the Union and the attorney who represents its members. Since the operative portion of the decree prohibits any financial connection between the attorney and the Union, the decree cannot stand; and to the extent any other part of the decree forbids this arrangement it too must fall."

The foregoing holdings are the natural outgrowth of basic First Amendment doctrine. This Court has recognized that:

> "The First Amendment would . . . be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil." *Mine Workers*, 389 U.S. at 222.

Such "indirect restraints" are therefore void unless the state can show that the activity in question "materially and substantially interferes" with a "subordinating interest which is compelling," *Tinker* v. *Des Moines School District*, 393 U.S. 503, 507 (1969); *Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960); see also, e.g., *Wood* v. *Georgia*, 370 U.S. 375, 389 (1962); *Button*, 371 U.S. at 444.

Thus restrictions on group legal service plans must be justified by proof tending to show that the practice which is enjoined is an "oppressive, malicious or avaricious use of the legal process for purely private gain," *Button*, 371 U.S. at 443, or a "commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of Justice," *Trainmen*, 377 U.S. at 6. Moreover, this proof must be based on instances "of abuse, of harm to clients, of . . . actual disadvantage to the public and the profession," *Mine Workers*, 389 U.S. at 225 and not on "dangers . . . far too speculative to justify the . . . remedy invoked," *id.* at 223. For:

> "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case." *Carroll* v. *Commissioners of Princess Anne*, 393 U.S. 175, 183-184 (1968).

2. The principles just stated delineate the burden the State Bar was required to shoulder to be entitled to relief. It attempted to meet this burden by relying on the following undisputed facts established by the pleadings. First:

> "That, in or about the year 1930, the Brotherhood of Railroad Trainmen organized and established a so-called "Legal Aid Department" as a division of said Brotherhood of Railroad Trainmen, representing, as reasons for organizing said Legal Aid Department, the following:
>
> 'Many lawyers frequently abuse the confidence of their clients by effecting low settlements in the case in order to obtain a higher settlement in some other

case against the same railroad; incompetently preparing and processing such cases upon the law or the facts; not fully and fairly explaining to the client the terms of the employment, so that the client, after having assented to settlement, finds the proceeds thereof surcharged with items for expenses of litigation, medical expenses, expenses of one sort and another or the like, which are not legitimate, or if legitimate, were not explained to him before the settlement was concluded, as well as in other ways.

'Adequate compensation cannot in general be exacted if members of the Brotherhood are persuaded by claim agents either to settle their own claims or to place them in the hands of incompetent, inexperienced or otherwise inadequate counsel.' " (A. 6-7).

Second, that as of June 9, 1959, the date the answer herein was filed, the Union's Plan worked as follows:

"In many cases, but not in all, a member of the defendant Trainmen calls upon, contacts, or in some other manner explains to an injured member employee, or his bereaved family, the advisability of obtaining a lawyer, or the opinion of a lawyer, and recommends that they consult with the Legal Counsel designated, and further recommends that the Legal Counsel be retained if a lawyer is to be retained." (A. 13).

Third, that prior to April 1, 1959, the Union's Plan had included the following features:

"Representatives of the Brotherhood of Railroad Trainmen are reimbursed for their time in bringing injured employees or the survivors of the deceased employees to the offices of the Regional Counsel. Reimbursement is at the member representative's hourly rate of pay on the railroad. Member representatives are also reimbursed for any out-of-pocket expenses incurred in bringing injured employees or the survivors of deceased employees to Regional Counsel." (A. 8).

* * *

"Some of the [Unions] members have represented, as was the fact in most cases arising in the Lower Peninsula of the State of Michigan, that the legal

> counsel will not charge in excess of twenty-five percent (25%) of the amount of any recovery whether the recovery be affected by suit or settlement, and that this percentage would include expenses incidental to the investigation and any litigation of the claim." (A. 13).

In addition the bar relied on evidence designed to demonstrate that between 1953-1960 the legal counsel designated by the Union had handled a substantial, albeit declining, number of the FELA cases involving Michigan residents (A. 64-89).

As we read the record the above constitutes all of the relevant facts which can be gleaned from the pleadings and the trial transcript. These facts establish that the Union's Plan, in its essence, is constitutionally protected:

> "It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be in vain and futile if the workers could not talk together freely as to the best course to follow." *Trainmen*, 377 U.S. at 5-6.

Moreover, as this Court recognized in *Trainmen*, in regard to FELA claims it can aptly be said that the Union "and its members are in every practical sense identical. The [Union] . . . is but the medium through which its individual members seek to make more effective expression of their own" interests, *Button*, 371 U.S. at 442. This being so, the limitations placed on the judiciary in *Trainmen*, *Mine Workers* and *Carroll*, see, pp. 6-7 *supra*, are controlling in the instant case. It is plain that those limitations were disregarded by the court below.

First, there is no proof that the Union's Plan, as it operated at the time the instant case came to issue, was subject to the evils that *Button* and *Trainmen* state do provide a proper basis for state regulation. There is not a single indication that the Plan led to misuse "of legal

process for purely private gain" or to "commercialization which threaten[ed] the moral and ethical fabric of the administration of justice." Indeed, the evidence offered by the Bar as to the effects of the Plan was restricted to a showing that a significant proportion of the members chose to use Union designated counsel. Since "abuse . . . harm to clients . . . actual disadvantage to the public" must be proved to authorize relief, *Mine Workers*, 389 U.S. at 225, there can be no doubt that the injunction issued here cannot be justified by the terms or the consequences of the Plan the Michigan courts had before them. On this record the Plan "cannot be considered as a threat to legal ethics" *Trainmen*, 377 U.S. at 7.

Second, it is equally manifest that the injunction cannot be justified by the remaining practices which were "admitted" but which the Union contended had been discontinued as of April 1959. *Mine Workers* establishes that the Union had a right to protect its members by securing a commitment from the counsel it recommends that the maximum fee charged would not exceed 25% of the recovery. One of the basic reasons for the Mine Workers plan was to remedy a situation pursuant to which "members . . . were required to pay forty to fifty per cent of the amount recovered in damage suits, for attorneys' fees," 389 U.S. at 219. The Mine Workers dealt with this problem by hiring an attorney thereby putting an end to the fee system. The bar attacked that solution on the ground that it placed a lay intermediary between the attorney and his client. This Court, of course, rejected that challenge on the ground that the financial arrangement between the Mine Workers and its attorney had not resulted in actual abuses, 389 U.S. at 224-225. In the instant case the Union has sought to meet the same problem by limiting the fees charged by the lawyers cooperating with the Plan rather than doing away with that system of compensation. We cannot conceive of a train of thought which could lead to any conclusion other than that the more limited response utilized here is protected under *Mine Workers*. Looking at the matter in terms of the attorney-client relationship the

Union's role in the instant Plan is less obtrusive than it was in *Mine Workers*. And as this Court recognized in that case the danger of conflicts of interest between the union and its members are negligible under either system, 389 U.S. at 224. Finally, here as in *Mine Workers* proof of actual abuses is absent. Thus, the fact that the Union's plan limited the maximum fees charged cannot justify the injunction which has been issued.

The Union also "admitted" that prior to 1959 it paid the members who gave of their time to aid the Plan. The fact that the railroads, and their insurers, pay the claims adjusters, investigators and attorneys who seek to deny or limit the relief obtained by victims of accidents covered by FELA is accepted as a matter of course.[3] First Amendment consideration aside, serious due process questions are raised by a rule of law which allows one side to litigation to secure paid personnel while limiting the other to uncompensated assistance. Moreover, there has been no showing that this aspect of the Union's plan violated the standard of actual harm set out in *Mine Workers*. Thus, this aspect of the Union's plan, like the others, provides no basis for the Michigan courts' injunction.

We have dealt with the pre-1959 aspects of the Plan on the merits in order to demonstrate that they do not provide grounds for relief. It is our view, moreover, that this evidence is too far removed in time to support the judgment at issue, which was entered in May 1968 and affirmed in March 1970. The constitutional presumption is against the regulation of First Amendment conduct. The only justification for an injunction directed at such activity is "the essential needs of the public order," *Carroll*, 393 U.S. at 183. And the needs of the public order do not include in-

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[3] The sole witness for the Bar in the instant case was an employee of the Association of American Railroads who readily admitted that one of his functions was "to cooperate with the various bar associations throughout the country in connection with railroad claims." (A. 90).

junctions aimed at activity discontinued some eleven years before. Indeed, there is a substantial question as to whether such evidence provides the rational justification for regulation required by due process, see, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 239-247 (1957) (overturning an exclusion from the legal profession based on acts 15 years in the past).

The sum of the matter is this. The court below viewed this case as an abstract exercise in which its sole responsibility to this Court's precedents was to measure the injunction against the holding in *Trainmen*, narrowly conceived (A. 211-212). Because it entertained this view it failed to fulfill its responsibility to determine whether the State Bar had made out a case which provided a basis for the regulation of a group legal service plan whose basic purpose and structure entitled it to First Amendment protection. And as we have shown, this inquiry can lead to only one conclusion—that there is nothing in this record which would justify the issuance of any relief whatsoever to the State Bar. The decision below should therefore be reversed with instructions to dismiss or, in the alternative, to allow the Bar to present proof that there are aspects of of the Plan, as presently operated, which entitle it to some measure of relief.

CONCLUSION

For the above stated reasons the decision below should be reversed.

J. Albert Woll
General Counsel, AFL-CIO
Robert C. Mayer
Laurence Gold
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D.C. 20005

Thomas E. Harris
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006

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